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No. 85-771

In The

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT G. BARON,

Petitioner,

vs.

ANDREW P. MELONI, INDIVIDUALLY AND AS SHERIFF OF THE COUNTY OF MONROE, AND THE COUNTY OF MONROE,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT COUNTY OF MONROE

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QUESTIONS PRESENTED

1. Whether two orders given to petitioner, a deputy sheriff, prohibiting him from associating with the wife of a reputed mafia leader violate petitioner's First and Fourteenth Amendment rights.

2. Whether orders given to petitioner not to associate with the wife of a reputed mafia leader violate his rights to privacy.

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BRIEF IN OPPOSITION OF RESPONDENT COUNTY OF MONROE

The respondent, County of Monroe, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 12, 1985.

STATEMENT OF THE CASE

Petitioner, Robert G. Baron, was a deputy sheriff with the Monroe County Sheriff's Office until his termination in 1980 following a hearing wherein he was found guilty of insubordination. The charges arose from two orders given to petitioner in 1978 not to associate with Linda Vaccaro, the then wife of a reputed mafia leader in Rochester, New York.

On April 20, 1978, petitioner's patrol vehicle was seen in the driveway of reputed mobster Angelo Vaccaro's residence. At that time his residence and his wife, Linda Vaccaro, were under surveillance by the Organized Crime Task Force which observed the petitioner at that house from 1:00 a.m. until 5:00 a.m., during the hours when he was on duty.

The Task Force reported the matter to other law enforcement officials who immediately contacted the Sheriff's office and an investigation was conducted. When it was determined that Mr. Baron did indeed spend a lengthy period of time, while on duty, at the Vaccaro residence, he was ordered, on April 24, 1978, not to associate with Linda Vaccaro. Petitioner claimed, at that time, that he did not have any association with Linda Vaccaro, that he did not know her or her last name, and only stopped at her house to return a gold watch found at her workplace. In spite of the order not to associate with Linda Vaccaro and his claim that he did not know her, petitioner deliberately continued to associate with her. He was observed on three separate occasions in her company during the months of June and July of 1978. At that time, a second order was given to him not to associate with her. As a result of the disobeyance to the lawful orders, departmental charges were filed against him.

Petitioner then commenced a set of maneuvers which pushed the hearing on the charges beyond the thirty day time in which it was required to be heard, and then moved to dismiss the charges

on the ground that the hearing was not held within the required time. Petitioner lost and took the matter all the way up to the New York Court of Appeals which ruled against him on the ground that he was the moving force behind the adjournments. At that time he did not challenge the constitutionality of the orders given to him.

While the matter was being litigated in the courts, petitioner continued to associate with Linda Vaccaro and on April 13, 1979 a second set of charges was filed against him. Petitioner then moved in court in an attempt to stay the proceedings and when he lost he appealed, but never perfected his appeal. At that time plaintiff also challenged, in State Supreme Court, the constitutionality of the orders given to him. Judge Pine ruled against him and determined that the orders did not violate any of his rights. While this set of charges was pending, it came to light that petitioner was still associating and seeing Linda Vaccaro, who, on March 22, 1980, was involved in an automobile accident while driving petitioner's Lincoln Continental. Thereafter, on March 24, 1980, a third set of charges was filed against Mr. Baron. A hearing was then held on this last set of charges and once again petitioner raised the argument, before the hearing examiner, that the rules promulgated by the Sheriff were vague, broad and unconstitutional and could not be enforced. The hearing officer accepted this argument as to two of the rules but rejected the argument that the orders, which prohibited petitioner from seeing Linda Vaccaro, violated his civil rights. That was the second time that the question of the constitutionality of the orders was raised, argued and decided. Thereafter, the hearing officer found petitioner guilty of insubordination. Sheriff Meloni then fired the petitioner. Petitioner appealed from the decision of the Sheriff to terminate him and also moved in court for an order to limit the appeal to the question of the review of the termination of the petitioner and to prohibit the arbitrator from ruling on the merits of the case.

The court ruled that the review would be limited to the question of the termination. The arbitrator found that the termination was proper, was neither arbitrary nor capricious, and was based on good solid reasoning.

Petitioner then commenced this action in Federal Court. Defendants moved to dismiss, or in the alternative, for summary judgment before Judge Telesca, and he granted the motion. Petitioner then appealed and the Second Circuit reversed and remanded for discovery on the question of whether or not the orders of April, 1978 and July, 1978 were valid in March of 1980.

Sheriff Meloni was deposed and gave, in great detail, the reasons why the orders were valid.

Sheriff Meloni stated that petitioner's activities were of great concern in the department and outside. The Sheriff testified that in March, 1980, the investigation into the mob's activities was continuing, with the Sheriff's office actively participating, even though the Task Force on Organized Crime had been disbanded. (A-46) The Sheriff testified that Mr. Baron's activities relative to his relationship with Linda Vaccaro were affecting morale in the department and that petitioner's effectiveness was minimized as he could not be assigned to certain duties as a result of this association. He further testified that a deputy has an obligation not to expose himself to associations with people who could exploit his potential to gather information. (A-45)

Sheriff Meloni testified that even after Linda Vaccaro's husband had been convicted and incarcerated there was a reason for the order that Mr. Baron not have a relationship with Mrs. Vaccaro. The Sheriff explained that Linda Vaccaro was identified as a person who had associations not only with, obviously, her husband, Angelo, but other members of alleged organized crime in this community, and that she continued to associate with alleged

mobsters and also visited her husband in jail during her association with petitioner. (A-37) Sheriff Meloni stated that the association was bringing discredit to the department and that Mr. Baron was putting himself in a position of exploitation. The Sheriff testified that Mr. Baron had access to sensitive information. (A-38)

Petitioner did not dispute that the Monroe County Sheriff's office was involved in investigations into organized crime activity in 1980. Nor did he dispute that, as a deputy sheriff, he had access to the criminal history files and the investigative files of the Sheriff's office. (A 12-13)

Nor does petitioner dispute that, at the time of the accident in March, 1980, Linda Vaccaro was still the wife of Angelo Vaccaro. Although Angelo Vaccaro had, at that time, just instituted divorce proceedings against Linda, the two were legally married until June, 1980. Petitioner does not dispute that Linda Vaccaro was present at Angelo's January, 1980, criminal trial, or that she visited him during his incarceration.

The Sheriff also testified that he could not place petitioner in the detective division or give him any investigative or organized crime assignments. (A-13)

The respondents then brought a new motion for summary judgment, which was granted by Judge Curtin. Petitioner appealed and the Second Circuit affirmed on the decision of Judge Curtin. Petitioner then filed this petition for Writ of Certiorari to the United States Court of Appeals, Second Circuit.

SUMMARY OF ARGUMENTS

1. THE ORDERS DID NOT VIOLATE PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The government may regulate and restrict certain constitutional rights of its employees. The regulations must meet a rational criteria to be upheld as constitutional.

2. THE ORDERS DID NOT VIOLATE PETITIONER'S PRIVACY RIGHTS.

Right of privacy pertains to intimate family matters. Two adults married to two others, respectively, do not fall under this protection.

3. NO CONFLICT EXISTS BETWEEN THE CIRCUITS REGARDING THESE QUESTIONS.

Petitioner attempts to rely on an Eleventh Circuit case to claim that a conflict exists between the Second Circuit and the Eleventh Circuit regarding the issues in this action. A review of the case cited by petitioner clearly indicates that the Eleventh Circuit did not decide the issues decided in this case.

ARGUMENTS WHY THE WRIT SHOULD BE DENIED

1. THE ORDERS DID NOT VIOLATE PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS

Petitioner alleges that, as a deputy sheriff, he has the right to free association with whomever he wishes and that an order which limits his association violates his right to free association.

The Supreme Court recognized the right of government to regulate and restrict certain constitutional rights of its employees. In

the case of *Meehan v. Macy* 392 F.2d. 822, (cited with approval in *Arnett v. Kennedy* 416 U.S. 134), an employee who printed and distributed defamatory Lampoon of Governor of Canal Zone was subject to discharge for that conduct. The court, at page 832, quoted Justice Holme's ruling in the case of *McAuliffe v. City of New Bedford* 155 Mass 216, 220 where he stated:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

The court in the *Meehan* case stated at 832:

> "Courts are increasingly re-examining and considering the issue whether and to what extent the Government's prerogative to employ or discharge permits it to regulate conduct of its employees that would, in the absence of the employment relationship, be protected from interference by the First Amendment."

The court then continued:

> "Government employees do, to some extent, have 'lesser rights' than others have under the constitution, since they may be required to suspend or refrain from certain activities (e.g. political campaigning) that are embraced within the constitutional rights of others, when such activities are reasonably deemed inconsistent with their public status and duties."

It is not only important that government and its employees in fact avoid practicing political activities, but it is also critical that they *appear to the public to be avoiding it,* if confidence in the system of representative government is not to be eroded to a disastrous extent. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO* 93 S. Ct. 2880, 2890.

Justice White stated in upholding the constitutionality of the Hatch Act, which bars federal employees from participating in

any political activity, a strong restriction on their First Amendment right:

> "Neither the right to associate nor the right to participate in political activities is absolute in any event."

In the case of *York County Firefighters Assn. v. County of York Virginia, et al.* 589 F.2d. 775 (1978) a regulation prohibiting belonging to a union by supervisors in a fire department was upheld by the court as constitutional and the court stated at 778:

> ". . . *a first amendment right to associate may be validly limited where the limitation is necessary to a substantial and legitimate state interest. An efficient fire department is a legitimate and substantial interest because of the need of firefighters to act quickly and efficiently* . . . and the limitation on membership, is necessary in order to forestall a division of the supervisors loyalty between the union and their employer." (emphasis supplied)

The court also found that the supervisors could belong to other unions which would not create the problems cited.

In our case it is obvious that association with the wife of a reputed mob leader can create a conflict of interests and can have a devastating effect on the public's confidence in the department and create a conflict of interests between the deputy and the department.

In *Kelley v. Johnson* 424 U.S. 238, a regulation regulating hair length of police officers, was upheld by the court on the ground that:

> "More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *Civil Service Commission v. Letter Carriers* 413 U.S. 548; *Broadrick v. Oklahoma* 413 U.S. 601. If such state regulations may survive such challenges based on the explicit language of the

> First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interests protected by the Fourteenth Amendment." (Id 245)

In the *Kelley* case the court suggested that the state may have a greater regulatory power over the activities of its police officers by virtue of their special paramilitary nature, than the state would have over its other employees. (at page 248-249)

The *Kelley* court established a rational criteria to be applied in determining the constitutionality of the challenged orders rather than a compelling state interest. Thus, if the orders are found arbitrary it would constitute a deprivation of constitutional rights, but if found to be rational, would be upheld as constitutional. See also *Yonker v. Gully* 536 F.2d. 184.

In our case, the petitioner, a deputy sheriff, is challenging orders forbidding him to associate with the wife of a leader of a mafia faction involved in serious crimes, who was under surveillance and charged with serious crimes and whose activities appeared as headlines in the local newspapers.

The purposes of the challenged regulations are, among others: (1) to insure public confidence in members of its law enforcement body by avoiding the appearance of having deputy sheriffs appear to be conspiring with criminals, whether directly with the criminals or through their close relatives; (2) to prevent exploitation of the deputies; (3) to prevent the temptation to deputy sheriffs to look the other way when their criminal friends or their friends' relatives violate the law; (4) to prevent the temptation and opportunity for deputy sheriffs to take bribes from criminals, either directly or through their close relatives; (5) to preserve the integrity and effectiveness of the criminal judicial system by preserving the credibility of deputy sheriffs' testimony at

criminal trials; (6) to preserve the integrity of the department and the individual officers therein; (7) to promote confidence by the public in the Sheriff's office; and (8) to avoid any appearance of impropriety in the Sheriff's office.

The purposes of the challenged orders rebut any claim that the regulations are not rationally connected to the legitimate objectives they seek to obtain. The regulations are designed to maintain an uncorrupt police force and to maintain public confidence in its police force, to avoid the appearance of an impropriety on the part of the police officers, and to prevent a situation where a deputy may find himself in a position of conflict of interests, or subject to pressure to provide sensitive information to his friends.

The same reasoning applied to also and in particular, in 1980. At that time, Sheriff Meloni took office and charge of a sheriff's department which had just gone through a series of two years of headlines in newspapers, in terms of alleged improprieties and wrongdoings. Many deputies wanted to know what was going on with Mr. Baron and why he was not being terminated. There was a general consensus in the organization that things were moving somewhat slowly with Mr. Baron. (A-44)

Sheriff Meloni testified as to what happened in the department just prior to his taking over. He stated (A 55-58):

> A. Well, as you know, the department had done a wonderful job in bringing a lot of the alleged mobsters to trial and conviction, and part of the process was some alleged tampering with evidence, and that brought the beginning of a series of allegations against the department, and it went downhill from there: three deputies had been arrested for burglary; another deputy had been arrested for stolen hubcaps; there were stories and allegations about improprieties as it related to how the mobsters who were in custody, federal witness custody in the jail, were handled; missing prop-

erty. This series went on and on by the Gannett press about all of the kinds of things that were going on in the Sheriff's Department.

Q. And that finally came to a head in what year?

A. In — It started in '77; came to a head during the election, obviously, of '79, politically speaking anyways, and —

Q. So between '77 and seventy — '80.

A. '79.

Q. (continuing) — and December of '79, all this —

A. Right, the headlines were — acknowledgements of alleged improprieties were headlining the Gannett press every day. That took a terrible, terrible toll on the organization. There was a great deal of distrust; our self-worth, our self-image went to hell, and I took over, you know, a psychologically depressed organization after such a thing, but it was —

Q. Did you vow to —

A. My charge was and my campaign theme was to return credibility and remove the cloud. And certainly, you know, I — I think, when you talk about winning or losing, I didn't win the election; I think my predecessor lost it, and I think that's a better word to describe what happened.

Q. Your concern was to have a department that would be —

A. — as clean as a hound's tooth and no corner cutting. One of the things that I have told every class of deputies that I've ever recruited and hired since 1968 was basically that they are deputy sheriffs 24 hours a day; that I expect their off-duty behavior to be as honorable and with as much integrity, which is obvious to the community, as when they're on duty eight hours; that there's no distinction between off-duty and on-duty time as it relates to the image and espe-

cially the perception they give the public. That speech I have given to every sheriff's deputy, whether he be civil, jail or police bureau, since I've been an undersheriff and handled recruiting. And in that sense --

Q. Was that speech also given to Deputy Baron?

A. Absolutely.

Q. And he was aware of it?

A. Absolutely.

Thus, the petitioner knew, as a condition of employment, that his behavior off duty must also be beyond reproach.

The question also remains whether petitioner, who was married at the time, had a constitutional right to "run around" with Linda Vaccaro, who was married at that time, and whether such right is a constitutionally protected right, and whether such right would be a protected right even had they not been married to others. In the case of *Wilson v. Swing* 463 F. Supp 555, two police officers, a male and a female, were having an extra-marital affair, and were directed not to see one another. They moved in court alleging that their First Amendment rights were being violated. The court stated at 563:

> "The court found that adulterous conduct may be restricted as it casts a poor light on the department as a whole; the morale and discipline within the department could suffer as a result of community disapproval. Adultery is not protected by First Amendment guarantee of freedom of free association (see *Griswold v. Connecticut* 381 U.S. 479; *Poe v. Ullman* 367 U.S. 497) nor by the Fourteenth Amendment."

The courts have recognized the First Amendment right to engage in association for the advancement of beliefs and ideals. The right is protected because it promotes and may well be essen-

tial to the 'effective advocacy of both public and private points of view particularly controversial ones' that the First Amendment is designed to foster. *N.A.A.C.P. v. State of Alabama* 357 U.S. 449; *Runyan v. McCrary* 427 U.S. 160.

In our case it is obvious that the association between Mr. Baron and Mrs. Vaccaro was for purposes other than the exchange of political or ideological ideas. Nor is petitioner claiming that the orders in any way inhibited him from joining with others to promote some psychological, political, scientific, cultural or religious beliefs. He was seeking instead the right to consort socially and for other reasons perhaps with an individual whom he knew had been the subject of police investigations and surveillance and who has been for many years, even prior to his beginning his association with her, associated with various leading mafia figures.

Such a right is not encompassed within the First Amendment right of free association.

Petitioner has attempted on several occasions to interpose his marriage, in July 1980, to Linda Vaccaro as a basis to his allegations of interference with that relationship. However, until June of 1980, long after the termination of petitioner from employment, Mrs. Vaccaro was still a married woman and, therefore, could not be married to petitioner even if we believe the claim that it was in March of 1980 that papers were served on Mrs. Vaccaro to dissolve the marriage. From 1978 until June 1980, she was married to another, as was Mr. Baron during part of that time. It should be noted that in 1978 Mr. Baron specifically claimed that he did not know who Linda Vaccaro was, that there was no relationship between them and that the incident on April 20, 1978 at her home where he spent several hours, was for returning a gold watch that she allegedly lost (even though it had never been reported as lost). Strange as it may seem, even though Mr. Baron did not know who she was, nor allegedly had any interest in her, he still refused to obey lawful orders given to him and continued

to see this woman whom he "did not know" according to him, and all that during a period of time when active efforts were being made to eliminate the mafia in the County of Monroe.

2. THE ORDERS DID NOT VIOLATE PETITIONER'S PRIVACY RIGHTS

The United States Supreme Court case wherein a constitutional right of privacy was established was *Griswold v. Connecticut* 381 U.S. 479. However, subsequent U.S. Supreme Court cases have indicated that the right of privacy, as established in *Griswold,* is a right to be free from government intrusion in intimate matters pertaining to the family. *Eisenstadt v. Baird* 405 U.S. 438; *Zablocki v. Redhall* 434 U.S. 374 at 385; *Kerry v. Population Services* 431 U.S. 678 at 684-685.

In the case at bar, the activity petitioner alleges is protected by right of privacy, is his association, as a deputy sheriff, on or off duty, with an individual whom petitioner knew to be the wife of a leading mafia figure. Such activity is not an intimate family matter and is, therefore, not accorded constitutional protection under the right of privacy.

It is true that petitioner eventually married Linda Vaccaro, but such event took place years after the orders were issued and long after he was terminated. Furthermore, by petitioner's own admission, at the time the association with Linda Vaccaro began both he and Linda Vaccaro were married to two different people. Linda Vaccaro was attempting to reconcile with her husband and petitioner claimed that he did not know who she was and had no close relationship with her except for a mere acquaintanceship.

At the time the last set of charges was filed against petitioner, Linda Vaccaro was still married to her mobster husband and, therefore, no family relationship existed between petitioner and Mrs. Vaccaro. The orders of 1978 were given at a time when nei-

ther petitioner, nor his wife, by their own admissions, thought of being married and the violation and insubordination of the petitioner took place continuously, over a three year period, when he was not married to Linda Vaccaro, and when neither one of them was free to marry the other. Thus the fact that in July of 1980, long after petitioner was terminated, petitioner and Linda Vaccaro were married does not create a privacy right violation. There must be in existence a family relationship at the time the alleged violation of rights occurs.

But, even if the association with the wife of a leading mobster is an activity that falls within the protection zone of privacy, the petitioner must show that the order and regulations at issue are arbitrary and irrational as per the test set forth in *Kelley v. Johnson* 425 U.S. 238 so as to create a violation of First and Fourteenth Amendment rights of a government employee. This he failed to do. Sheriff Meloni's testimony, on the other hand, clearly established, without contradiction, that the orders were rational and even had compelling reasons, not only at the time they were issued, but also in March of 1980 when petitioner was charged with insubordination, which he admits.

3. THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

Petitioner claims that the Second Circuit's decision conflicts with the decision adopted by the Eleventh Circuit in the case of *Wilson v. Taylor* 733 F.2d. 1539. Petitioner claims that in that case the court held that a police officer's association with the woman he was dating was a constitutionally protected freedom of association.

Petitioner's interpretation of that case is erroneous. The Eleventh Circuit, in footnote 3 at page 1544, specifically stated that

their holding was a narrow one and that they do not hold that a law enforcement officer may never be fired because of associations with others.

The court itself distinguished between the case of *Wilson v. Taylor* and other cases by stating that in the *Wilson* case the City of Winter Park made the only argument that dating was not protected under the First Amendment freedom of speech provision, and thus the court found that dating in general is a protected right.

The court stated that the City did *not* make the argument that even if dating were protected under the freedom of association provision of the First Amendment, a law enforcement officer's rights under that provision could be curtailed due to the nature of police work. The court specifically stated:

> "We choose not to render an advisory opinion on what conduct would be sufficient for termination of a police officer who associates with certain felons, indicted individuals, suspects, or their relatives." (p. 1545)

Thus, it is clear that the *Wilson* court, did not address the issue which is central to our case, namely whether a police officer may date the wife of a mobster, either before or after the mobster's conviction, when the wife keeps in close touch, not only with the husband, but also with other reputed organized crime members. Thus, it is clear that there is no conflict between the two circuits and petitioner's reliance on *Wilson* is misplaced.

CONCLUSIONS

The Second Circuit upheld the decision of Judge Curtin, who, based on Sheriff Meloni's testimony, which was uncontradicted, found that based on the facts in this particular case the orders given to petitioner not to associate with the wife of a mafia leader were reasonable at the time he was brought up on charges for the third time for insubordination. Inasmuch as Sheriff Meloni's testimony was not contradicted and the orders were found reasonable, the Second Circuit was correct in affirming the decision.

The Second Circuit's decision applies to narrow circumstances and to specific facts, but even if its application was broad, it does not create new law as there are numerous decisions which have held that police officers behavior off duty may be curtailed and no conflict arises between the various circuits on this question.

Based on the above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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